

**UTAH SUPREME COURT ADVISORY COMMITTEE  
ON RULES OF CIVIL PROCEDURE**

**Summary Minutes – May 27, 2020**

**DUE TO THE COVID-19 PANDEMIC AND STATE OF EMERGENCY  
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

<b>Committee members, staff &amp; guests</b>	<b>Present</b>	<b>Excused</b>	<b>Appeared by Phone</b>
Jonathan Hafen, Chair	<b>X</b>		
Rod N. Andreason	<b>X</b>		
Judge James T. Blanch	<b>X</b>		
Lauren DiFrancesco		<b>X</b>	
Judge Kent Holmberg	<b>X</b>		
James Hunnicutt	<b>X</b>		
Larissa Lee		<b>X</b>	
Trevor Lee	<b>X</b>		
Judge Amber M. Mettler	<b>X</b>		
Timothy Pack		<b>X</b>	
Bryan Pattison		<b>X</b>	
Michael Petrogeorge	<b>X</b>		
Judge Clay Stucki	<b>X</b>		
Judge Laura Scott	<b>X</b>		
Leslie W. Slauch	<b>X</b>		
Trystan B. Smith	<b>X</b>		
Heather M. Sneddon		<b>X</b>	
Paul Stancil		<b>X</b>	
Judge Andrew H. Stone	<b>X</b>		
Justin T. Toth	<b>X</b>		
Susan Vogel	<b>X</b>		
Brooke McKnight	<b>X</b>		
Ash McMurray, Recording Secretary	<b>X</b>		
Nancy Sylvester, Staff	<b>X</b>		
Judge Richard Mrazik, Guest	<b>X</b>		
Representative Brady Brammer, Guest	<b>X</b>		
Doug Cannon, Guest	<b>X</b>		

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## **(1) WELCOME AND APPROVAL OF MINUTES**

Jonathan Hafen welcomed the committee and asked for approval of the minutes. Judge Amber Mettler moved to adopt the minutes. The minutes were approved unanimously.

## **(2) RULE 68**

Judge Clay Stucki led the continued discussion of the proposed amendments to Rule 68 to create new settlement and fee-shifting rules, and introduced Doug Cannon of the Utah Association for Justice (UAJ) and Representative Brady Brammer of the Utah House of Representatives.

Mr. Cannon reported on his communications with Nevada attorneys, including the Nevada Trial Lawyers Association President, regarding Nevada's settlement and fee-shifting rules. Mr. Cannon stated that most of the attorneys with whom he spoke did not have strong feelings regarding Nevada's rules but that a few had negative feelings. Mr. Cannon explained that judges in Nevada have discretion under their rules to award fees but rarely do so and that Utah judges would have less discretion under the committee's proposed amendments. Mr. Cannon further commented that current data are insufficient to show that Nevada's settlement and fee-shifting rules have made a difference and that the UAJ still opposes the proposed amendments. Leslie Slauch commented that the intended purpose of the proposed amendments is to move cases through the judicial system more expeditiously, and that there may be other and more effective ways to do so than adopting the proposed settlement and fee-shifting rules. Representative Brammer commented that the proposed amendments provide judicial discretion and reminded the committee that he previously provided to the committee a memorandum identifying several states, including Nevada and New Jersey, that have rules similar to the proposed amendments.

Representative Brammer presented briefly on his forthcoming bill related to the proposed amendments to Rule 68, stating that accompanying legislation would be necessary for the settlement and fee-shifting rules to be consistent in federal and state courts. Representative Brammer expressed his desire to coordinate with the judiciary on the bill. Mr. Hafen suggested that the committee could seek permission from the Utah Supreme Court to reach out to the state bar for input on the proposed rule and legislation prior to the 2021 general legislative session. The committee discussed the process and timeline for soliciting comments from the state bar. Representative Brammer expressed willingness to include information regarding the proposed bill.

Judge Kent Holmberg expressed support for soliciting comments from the state bar, but asked the committee if it would be better for the legislature to lead on the issue, noting that the proposed amendments and legislation would implement a major policy shift from the traditional American Rule that could significantly impact litigation. Judge Stucki acknowledged Judge

Holmberg's concerns but suggested that the significance of the policy shift may be a reason for the committee to act sooner to have time to craft the rule carefully.

Susan Vogel commented that the proposed amendments to Rule 68 and Representative Brammer's proposed legislation were brought to the committee as a solution to the problem of overworked judges but that the committee could not make an informed decision because it did not have data before it regarding which cases have caused the problem. Representative Brammer commented that the issue raised by Ms. Vogel had been addressed in some legislative subcommittee meetings and that the data indicate that debt-collection cases contribute significantly to judicial caseloads. Representative Brammer noted that the proposed amendments and legislation may impact debt-collection cases, but that the effect may be limited by contracts, which often have attorney fees clauses. Representative Brammer also commented that insurance defense cases also become burdensome when parties are unwilling to negotiate until late in the litigation process. Representative Brammer acknowledged that the data are imperfect and that the impact of the proposed amendment and legislation cannot be accurately predicted. Mr. Cannon commented that access-to-justice reforms are data driven and agreed with Ms. Vogel that the committee should identify the causes of burdensome judicial caseloads before crafting a solution.

Ms. Vogel expressed concern for self-represented parties, noting that a significant majority of cases involving self-represented parties are resolved on default and that no evidence has been provided to the committee showing that the proposed amendments to Rule 68 would help self-represented parties. Representative Brammer commented that the proposed amendments would uniquely benefit and give leverage to self-represented parties by allowing them to collect equivalent attorney fees. Ms. Vogel recommended that, if the proposed legislation passes, individuals should be educated and provided a calculator to help them calculate equivalent attorney fees.

The committee continued to discuss how to solicit feedback from the state bar on the proposed amendments to Rule 68 and Representative Brammer's forthcoming bill. The committee agreed to continue discussion on these issues at the committee's June meeting.

### **(3) RULES 4, 7, 8, 36**

Mr. Hafen and Nancy Sylvester reported on their communications with the Utah Supreme Court regarding the bilingual notice and caution language proposed for Rules 4, 7, 8, and 36. Mr. Hafen commented that the Supreme Court approved of the proposed notice and caution language and expressed a desire for them to be required uniformly to reduce potential confusion. Ms. Sylvester reported that the Supreme Court agreed that the rules should provide consequences for failure to include the notice and caution language but took issue with the proposed language providing for "equitable relief" as a potential remedy. Mr. Hafen noted that the Supreme Court is comfortable with judicial discretion but wants judges to have clearer guidance on what consequences are available.

The committee discussed what forms of relief should be available when the required notice and caution language are not given. Judge Andrew Stone suggested that failure to include the notice and caution language may be grounds for establishing excusable neglect or issuing a stay but warned against creating a means to circumvent Rule 60(b). Mr. Slaugh suggested providing additional time to respond if the court has not yet ruled on the motion. Judge Amber Mettler suggested adding language providing that a judge may provide other relief not listed. The committee discussed potential language in response to Judge Mettler’s suggestion, including “other relief” and “just and appropriate relief”; however, Judge Stone cautioned that the suggestions would be similar to “equitable relief,” which the Supreme Court advised against, and could allow a party to circumvent Rule 60(b). Judge Mettler suggested adding language explicitly limiting the ability of any relief granted to circumvent Rule 60(b). Mr. Slaugh commented that relief may be appropriate under rules other than Rule 60(b).

The committee discussed whether the bilingual notice and cautionary language should be included uniformly on every motion. Trystan Smith commented in support of including the notice and caution language on every motion and noted that the committee may need to amend Rule 56. Jim Hunnicutt commented that dispositive motions are rare in family law cases, but that some language related to notice and caution language may be needed in Rules 7 and 101. Mr. Hunnicutt and Ms. Vogel volunteered to review how best to include caution language on motions in the family law context.

#### **(4) RULE 64**

Ms. Sylvester reported on her communications with the Board of District Court Judges regarding the committee’s proposed amendments to Rule 64. After a brief committee discussion, Judge Stucki moved to send the proposed amendment to the Utah Supreme Court for comment. Justin Toth and Susan Vogel seconded the motion. The motion passed unanimously.

#### **(5) RULES 5, 109**

Ms. Sylvester introduced to the committee proposed amendments to Rules 5 and 109 to address an issue raised by some clerks of court concerning Rule 109 injunctions. Ms. Sylvester explained that the proposed amendments address a problem under the current rules and CORIS system where a respondent may receive a Rule 109 injunction prior to receiving a petition and, therefore, before the respondent knows that a case has been filed against the respondent. The committee briefly discussed the proposed amendments and the history of Rule 109. Mr. Hunnicutt moved to send the proposed amendments to the Utah Supreme Court for comment. Judge Stucki seconded the motion. The motion passed unanimously.

## (6) RULE 42

Judge Holmberg introduced to the committee Judge Richard Mrazik and proposed amendments to Rule 42 relating to consolidation of cases across district lines and transfer of venue. Judge Holmberg explained that the proposed amendments to transfer of venue were drafted in response to the Utah Supreme Court, which in a recent opinion invited the committee to address change of venue in addition to consolidation. Judge Mrazik commented that the proposed amendment explicitly addresses a judge's authority to transfer. The committee discussed the effect of the proposed amendments and made technical revisions to the language. Rod Andreason moved to send the proposed amendments, as revised by the committee, to the Utah Supreme Court for comment. Mr. Hunnicutt seconded the motion. The motion passed unanimously.

The committee revised the proposed amendments to Rule 42 as follows:

### **Rule 42. Consolidation; separate trials; venue transfer.**

**(a) Consolidation.** When actions involving a common question of law or fact or arising from the same transaction or occurrence are pending before the court, ~~it~~ in one or more judicial districts, the court may, on motion of any party or on the court's own initiative: order that the actions are consolidated in whole or in part, including for discovery, other pretrial matters, a joint hearing or trial of any, or for all the matters in issue in the actions; it may order purposes; stay any or all of the proceedings in any action subject to the order; transfer any or all further proceedings in the actions consolidated to a location in which any of the actions is pending after consulting with the presiding judge of the transferee court; and it may make other such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(a)(1) In determining whether to order consolidation and the appropriate location for the consolidated proceedings, the court may consider, among other matters: the complexity of the actions; the importance of any common question of fact or law to the determination of the actions; the risk of duplicative or inconsistent rulings, orders, or judgments; the relative procedural postures of the actions; the risk that consolidation may unreasonably delay the progress, increase the expense, or complicate the processing of any action; prejudice to any party that far outweighs the overall benefits of consolidation; the convenience of the parties, witnesses, and counsel; and the efficient utilization of judicial resources and the facilities and personnel of the court.

(a)(2) A motion to consolidate ~~cases shall be~~ actions may be filed and opposed by any party to any action that is the subject of the motion. The motion shall be filed in and heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to action filed and served on all parties in each case. The action pursuant to Rule 5. A notice of the motion shall be filed in each action. The movant shall and any party may file in each action notice of the order denying or granting the motion shall be filed in each case.

(a)(23) If a motion to consolidate is granted, the court orders consolidation, a new case number of the first case filed shall will be used for all subsequent filings {pleadings and papers} and the case shall be heard by the judge assigned to the first case in the consolidated case. The court may direct that specified parties pay the expenses, if any, of consolidation. The presiding judge of the transferee court may assign the consolidated case to another judge for good cause.

**(b) Separate trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues.

**(c) Venue Transfer.**

(c)(1) On timely motion of any party, where transfer to a proper venue is available, the court must transfer any action filed in an improper venue.

(c)(2) The court must give substantial deference to a plaintiff's choice of a proper venue. On timely motion of any party, a court may: transfer venue of any action, in whole or in part, to any other venue, including for discovery, other pretrial matters, a joint hearing or trial, or for all purposes; stay any or all of the proceedings in the action; and make other such orders concerning proceedings therein to pursue the interests of justice and avoid unnecessary costs or delay. In determining whether to transfer venue and the appropriate venue for the transferred proceedings, the court may consider, among other factors, whether transfer will: increase the likelihood of a fair and impartial determination in the action; minimize expense or inconvenience to parties, witnesses, or the court; decrease delay; avoid hardship or injustice otherwise caused by venue requirements; and pursue the interests of justice.

(c)(3) The court may direct that specified parties pay the expenses, if any, of transfer.

Note: These changes arise in part due to the Supreme Court's decision in *Davis County v. Purdue Pharma, L.P.*, 2020 UT 17.

**(7) ADJOURNMENT**

The remaining items were deferred until June 24, 2020. The meeting adjourned at 5:47 p.m.